

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ALASKA
3

4 ELIZABETH BAKALAR,

5 Plaintiff,

Case No. 3:19-cv-00025-JWS

7 vs.

8 **ORDER ON MOTIONS FOR**
9 **SUMMARY JUDGMENT**
10 **[Docs. 56, 76]**

11 MICHAEL J. DUNLEAVY, in his
12 individual and official capacities;
13 TUCKERMAN BABCOCK; and the
14 STATE OF ALASKA.

15 Defendants.
16

17 **I. MOTIONS PRESENTED**

18 At docket 56 Defendants Governor Michael J. Dunleavy (“Governor
19 Dunleavy”), Tuckerman Babcock (“Babcock”), and the State of Alaska (collectively
20 “Defendants”) filed a motion for summary judgment as to all claims asserted against
21 them by Plaintiff Elizabeth Bakalar (“Plaintiff”), who alleges that Defendants
22 terminated her employment as an assistant attorney general in violation of federal and
23 state free speech rights, the Alaska Constitution’s merit principle, and the implied
24 covenant of good faith and fair dealing. At dockets 75 and 76, Plaintiff filed a response
25 to Defendants’ motion for summary judgment and a cross motion for summary
26 judgment. Defendants filed their combined response and reply at docket 86. Plaintiff
27 replied at docket 93. Oral argument would not be of assistance to the court’s
28 determination.

II. BACKGROUND

On December 3, 2018, Plaintiff was notified that her employment as an assistant attorney general with the Alaska Department of Law had been terminated. At that time, Plaintiff had worked as an assistant attorney general for over 12 years under five administrations and seven Attorneys General.¹ She had been steadily promoted during her tenure with the Department of Law, and at the time of her firing she was classified as an expert-level “Attorney V” within the Labor and Affairs Section. As an attorney in the Labor and Affairs Section, Plaintiff was assigned to be primary counsel for the Lieutenant Governor and the Division of Elections. She handled voting rights cases, voter registration issues, ballot initiative certifications and referendum matters, and she drafted regulations and legislation.² She also was assigned to advise or represent other state agencies in high-profile or complex matters.³ By all accounts, Plaintiff was a well-regarded attorney within the Department of Law, securing numerous favorable decisions from the Alaska Supreme Court and the Ninth Circuit and receiving praise for her proficient and efficient legal work.⁴

The criticism lodged against Plaintiff during her tenure with the Department of Law arose in connection to her personal blog, entitled “One Hot Mess,” and its associated social media presence. She began the blog in 2014, primarily focusing on her lifestyle, parenting, and politics.⁵ Her commentary was personal in

¹ Docket 75-3 at ¶ 3.

² *Id.* at ¶¶ 3–7; Docket 75-33; Docket 75-7; Docket 56-1.

³ Docket 75-33.

⁴ Docket 75-2 at ¶¶ 3, 7; Docket 75-7; Docket 75-3 at ¶ 7.

⁵ Docket 75-3 at ¶ 15.

1 nature, discussing embarrassments, insights, and opinions, often in irreverent terms.
2 Plaintiff described her blog as a way “[t]o explore and probe with authenticity and
3 sometimes vulgarity, and hopefully some depth, the things we don’t like to face” and
4 the things people do not talk about.⁶

5
6 The blog was shared on Plaintiff’s Facebook account and was intended
7 to be public and widely shared.⁷ One post from 2015 about why Plaintiff chose to live,
8 work, and raise kids in Alaska was read by over 20,000 people.⁸ Another post from
9 2016, a political one that opposed the candidacy of Donald Trump and criticized those
10 who supported him, was republished by the Anchorage Daily News.⁹

11
12 After the 2016 presidential election, Plaintiff started blogging more
13 about politics, and President Trump in particular. As Plaintiff stated in one of her blog
14 posts, “[b]efore Trump, I wrote a lot more about parenting. Now I feel compelled to
15 write about Trump so that . . . if the sh[**] hits the fan my kids will have a
16 contemporaneous Handmaid’s Tale-style record of What the F[**]k You Did to Us.”¹⁰
17 Her commentary contained vitriolic criticism of the President and his associates. For
18 example, she stated in one early 2017 blog post as follows:
19
20
21

22 Our POTUS is manifestly delusional, likely senile,
23 sociopathic, treasonous, semi-literate, lecherous oligarch
24 who is scissoring the Constitution into red white and blue
25 confetti like Edward Cheeto-Hands with the help of
Congress, all at the direction of a repellent, rheumy-eyed

26 ⁶ [Docket 56-14 at 1.](#)

27 ⁷ [Docket 75-23 at 1 n.1, 6.](#)

28 ⁸ [Docket 56-7.](#)

⁹ [Docket 56-8.](#)

¹⁰ [Docket 56-23.](#)

1 alcoholic who legit wants to destroy democracy and
2 perpetuate the master race.¹¹

3 Plaintiff also maintained a twitter account, entitled “One Hot Mess AK” with her name
4 listed as the twitter handle, where she vented about the election of President Trump
5 and those who voted for him.¹² While the exact number of Plaintiff’s public comments
6 mentioning President Trump is not in the record, it is undisputed that posts criticizing
7 or mocking President Trump number in the hundreds. She acknowledged that she let
8 go of any fears about “personal and/or professional reprisal borne of calling Donald
9 Trump a fascist cantaloupe on the internet every day.”¹³

12 In response to Plaintiff’s blogging activities, another attorney in the state,
13 Nancy Driscoll Stroup, started a blog of her own entitled “Ethics and One Hot Mess
14 Alaska.” The purpose of her blog was to “make[] the case that Blogger Libby Bakalar
15 of ‘One Hot Mess Alaska’ fame should not be working as an Assistant Attorney
16 General for the State of Alaska.”¹⁴ She criticized Plaintiff as follows:

18 Alaskan Assistant Attorney General Libby Bakalar uses
19 extremely profane and vulgar and mean language in her
20 Blog. She makes fun of people based on their political
21 affiliations (Trump supporters) and their religion
22 (fundamental Christians) and lectures white people on
23 how they need to behave Take a look at her blog.

24 Is Ms. Bakalar the type of person we want working as an
25 attorney in the Attorney General’s office?

26 My opinion: NO.¹⁵

27 ¹¹ [Docket 56-24.](#)

28 ¹² [Docket 56-19.](#)

¹³ [Docket 56-21.](#)

¹⁴ *See, e.g.*, [Docket 75-9.](#)

¹⁵ [Docket 75-10.](#)

1 In line with this critique, Stroup repeatedly called for Plaintiff's termination, arguing
2 that she could not maintain a popular political blog and continue to maintain the
3 necessary impartiality in her job as an attorney with the Labor and State Affairs
4 Section.¹⁶ She also accused Plaintiff of using state time and resources to conduct her
5 personal blogging activities, in violation of Alaska's Executive Ethics Act.¹⁷ She
6 voiced these ethics complaints to state officials.¹⁸
7
8

9 Thereafter, the Department of Law initiated an investigation into
10 Plaintiff's blogging activities. It hired an independent third-party attorney to conduct
11 the investigation. As the investigator noted in his report, "[t]he primary impetus for
12 the investigation were concerns raised about the partisan political nature of 'One Hot
13 Mess Alaska' and the possible use by Ms. Bakalar of state resources or work time in
14 the creation of articles posted on the blog."¹⁹ The investigation, however, was limited
15 to two questions: (1) whether Plaintiff posted or in any manner worked on her blog
16 during work time or with the aid of state funds or resources; and (2) whether, if the
17 answer to the first question was "yes," such activity violated any law or policy
18 applicable to Plaintiff.²⁰ The inquiry did not consider whether Plaintiff's publishing
19 of her political opinions during personal time was in any manner improper given
20 Plaintiff's job as an assistant attorney general.²¹
21
22
23
24
25

26 ¹⁶ See, e.g., [Docket 75-12](#); [Docket 75-14 at 5](#).

27 ¹⁷ [Docket 75-13 at 2](#).

28 ¹⁸ [Docket 75-14 at 5](#).

¹⁹ [Docket 75-23 at 1](#).

²⁰ *Id.* at 1–2.

²¹ *Id.* at 2 n.3.

1 In March 2017, the investigator concluded that on occasion Plaintiff
2 engaged in activities associated with her blog during her normal work hours and with
3 her work computer but that any such time was de minimis and within commonly
4 accepted limits.²² He also found that any incidental work by Plaintiff on her blog
5 during work hours did not violate the Ethics Act, which prohibits employees from
6 using state resources for personal financial advancement or for partisan political
7 purposes.²³ He noted that while Plaintiff's blog "can be interpreted to evince a liberal
8 or progressive worldview, few posts actually meet the definition of having a partisan
9 political purpose."²⁴ The only posts that could fit within this definition would be those
10 critical of President Trump during his presidential candidacy, but there was "no
11 evidence that any of these specific potentially partisan posts were ever worked on by
12 [Plaintiff] during work hours or using state resources."²⁵

13
14 In November 2018, after winning the election, Governor Dunleavy
15 selected Babcock to serve as the chair of his transition team. On November 16, 2018,
16 Babcock sent a memorandum to most of the state's at-will employees.²⁶ The
17 memorandum required employees to submit a resignation, along with a statement of
18 interest in remaining employed with the new administration. The memorandum stated
19 in part as follows:
20
21

22 In the coming weeks, the incoming administration will be
23 making numerous personnel decisions. Governor-Elect

24
25
26 ²² *Id.* at 2, 12.

27 ²³ *Id.* at 3, 12–14.

28 ²⁴ *Id.* at 12–13.

²⁵ *Id.* at p. 13.

²⁶ Docket 75-30; Docket 75-31.

1 Dunleavy is committed to bringing his own brand of
2 energy and direction to state government. It is not
3 Governor-Elect Dunleavy's intent to minimize the hard
4 work and effort put forth by current employees, but rather
5 to ensure that any Alaskan who wishes to serve is given
6 proper and fair consideration.

7 As is customary during the transition from one
8 administration to the next, we hereby request that you
9 submit your resignation in writing on or before
10 November 30, 2018 to Team2018@alaska.gov. If you
11 wish to remain in your current position, please make your
12 resignation effective upon acceptance by the Dunleavy
13 administration.

14 Acceptance of your resignation will not be automatic, and
15 consideration will be given to your statement of interest in
16 continuing in your current or another appointment-based
17 state position. Please also include your email address and
18 phone contact so that you can be reached to discuss your
19 status directly.

20 Governor-Elect Dunleavy is encouraging you and all
21 Alaskans to submit their names for consideration for
22 service to our great state.²⁷

23 The memorandum was accompanied by a resignation form, which included a sentence
24 where employees had to choose whether or not they wanted to be considered for their
25 position with the Dunleavy administration.²⁸

26 The demand for the resignations of all at-will employees was reported in
27 the local newspaper. In past transitions, incoming administrations requested
28 resignations from only around 250 employees.²⁹ Governor Dunleavy explained his

²⁷ [Docket 75-30.](#)

²⁸ [Docket 75-32.](#)

²⁹ [Docket 75-31.](#)

1 decision to broaden the scope of this practice to a reporter: “We want to give people
2 an opportunity to think about whether they want to remain with this administration and
3 be able to have a conversation with us.”³⁰ Babcock was reported as saying as follows:
4

5 [Governor Dunleavy] just wants all of the state employee
6 who are at-will . . . to affirmatively say, “Yes, I want to
7 work for the Dunleavy administration” Not just
8 bureaucracy staying in place, but sending out the message,
9 “Do you want to work on this agenda, do you want to work
10 in this administration? Just let us know.” . . . I do think this
11 is something bold and different, and it’s not meant to
12 intimidate or scare anybody. It’s meant to say, “Do you
13 want to be a part of this?” . . . If you don’t want to express
14 a positive desire, just don’t submit your letter of
15 resignation . . . [a]nd then you’ve let us know you just wish
16 to be terminated.³¹

17 To keep their jobs employees had to actually offer up a resignation with an
18 accompanying statement of interest in continuing with the new administration and then
19 hope that the incoming administration would reject the resignation.
20

21 Plaintiff received the resignation memorandum, along with all other
22 lawyers in the Department of Law. Plaintiff submitted her resignation letter. She
23 stated as follows:
24

25 Per the November 16, 2018 request of Transition Chair,
26 Tuckerman Babcock, please accept this letter as notice of
27 my resignation from my position as Assistant Attorney
28 General in the Labor & State Affairs Section of the
Department of Law. My resignation is not voluntary, but
is instead being made at the request of Mr. Babcock, who
has indicated that if I do not submit my resignation as
requested my employment will be terminated. I would like
to continue serving the State of Alaska in the new

³⁰ *Id.*

³¹ *Id.*

1 Governor Dunleavy administration in my current position,
2 and hope that my resignation is not accepted.

3 I have been with the department over 12 years, and I am
4 assigned to work primarily on elections matters on behalf
5 of the Office of the Lieutenant Governor. In that capacity,
6 I represent the Division of Elections in litigation; provide
7 agency advice; testify on legislation; assist with federal
8 compliance; and help draft legislation and regulations in
9 the area of elections law.³²

10 She also stated in her letter that when her election workload is light, she is assigned to
11 represent other state agencies, such as the Office of the Governor, the Department of
12 Health and Social Services, Department of Administration, and the Department of
13 Public Safety.³³

14 Governor Dunleavy was sworn in at 12:00 p.m. on December 3, 2018.
15 Less than twenty minutes later, Plaintiff was notified that her resignation had been
16 accepted and that her employment with the state had been terminated, and she was
17 given less than two hours to clean out her office and leave the building.³⁴ Although
18 every attorney in the Department of Law received Babcock's memorandum, only one
19 other attorney's resignation letter was accepted. Like Plaintiff, this attorney had been
20 publicly critical of President Trump in her Twitter postings during the month leading
21 up to his inauguration.³⁵

27 ³² [Docket 75-33](#).

28 ³³ [Id.](#)

³⁴ [Docket 75-3 at ¶¶ 20, 21](#).

³⁵ [Docket 75-3 at ¶ 23](#); [Docket 75-14](#); [Docket 75-23 at 17](#).

1 Babcock stated that he made the decision to terminate Plaintiff based
2 primarily on the content of her resignation letter, explaining that he believed it
3 demonstrated an unwillingness to work professionally with the new administration.³⁶
4

5 This lawsuit followed. Plaintiff filed her complaint in state court and
6 Defendants removed. Plaintiff asserts a 42 U.S.C. § 1983 claim against Defendants
7 for violation of her First Amendment rights. She also alleges that her termination
8 violated her free speech rights under Article I, § 5 of the Alaska Constitution, the
9 Alaska Constitution's merit principle, and the implied covenant of good faith and fair
10 dealing. She seeks damages, as well as injunctive and declaratory relief. Both parties
11 now seek summary judgment on these claims.
12
13

14 III. STANDARD OF REVIEW

15 Summary judgment is appropriate where “there is no genuine dispute as
16 to any material fact and the movant is entitled to judgment as a matter of law.”³⁷ The
17 materiality requirement ensures that “[o]nly disputes over facts that might affect the
18 outcome of the suit under the governing law will properly preclude the entry of
19 summary judgment.”³⁸ Ultimately, “summary judgment will not lie if the . . . evidence
20 is such that a reasonable jury could return a verdict for the nonmoving party.”³⁹
21
22 However, summary judgment is mandated “against a party who fails to make a
23
24
25
26

27 ³⁶ Docket 87-4 at 36.

28 ³⁷ Fed. R. Civ. P. 56(a).

³⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

³⁹ *Id.*

1 showing sufficient to establish the existence of an element essential to that party's case,
2 and on which that party will bear the burden of proof at trial.”⁴⁰

3
4 The moving party has the burden of showing that there is no genuine
5 dispute as to any material fact.⁴¹ Where the nonmoving party will bear the burden of
6 proof at trial on a dispositive issue, the moving party need not present evidence to show
7 that summary judgment is warranted; it need only point out the lack of any genuine
8 dispute as to material fact.⁴² Once the moving party has met this burden, the
9 nonmoving party must set forth evidence of specific facts showing the existence of a
10 genuine issue for trial.⁴³ All evidence presented by the non-movant must be believed
11 for purposes of summary judgment and all justifiable inferences must be drawn in favor
12 of the non-movant.⁴⁴ However, the nonmoving party may not rest upon mere
13 allegations or denials but must show that there is sufficient evidence supporting the
14 claimed factual dispute to require a fact-finder to resolve the parties' differing versions
15 of the truth at trial.⁴⁵ “[W]hen simultaneous cross-motions for summary judgment on
16 the same claim are before the court, the court must consider the appropriate evidentiary
17 material identified and submitted in support of both motions, and in opposition to both
18 motions, before ruling on each of them.”⁴⁶
19
20
21
22
23
24

25 ⁴⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

26 ⁴¹ *Id.* at 323.

27 ⁴² *Id.* at 323–25.

28 ⁴³ *Anderson*, 477 U.S. at 248–49.

⁴⁴ *Id.* at 255.

⁴⁵ *Id.* at 248–49.

⁴⁶ *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001).

IV. DISCUSSION

A. Plaintiff's § 1983 Claim Based on the First Amendment

Plaintiff asserts her First Amendment retaliation claim against Defendants pursuant to 42 U.S.C. § 1983. Section 1983 creates a private right of action for those plaintiffs seeking to redress and remedy constitutional wrongs caused by a “person” acting “under the color of state law.”⁴⁷ “To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law.”⁴⁸ A state, its agencies, and officials acting in their official capacity are not considered “persons” for purposes of § 1983 and therefore cannot be sued thereunder.⁴⁹ An exception exists for § 1983 claims brought against state officials sued in their official capacity for prospective injunctive or declaratory relief.⁵⁰ These claims, however, must be brought against state officials with the ability to provide such relief in their official capacities.⁵¹ Section 1983 claims seeking monetary damages may only be brought against a state official if the official is sued in his or her individual capacity, and such claims are

⁴⁷ 42 U.S.C. § 1983.

⁴⁸ *Long v. Cty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006).

⁴⁹ *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Wolfe v. Strankman*, 392 F.3d 358, 364 (9th Cir. 2004).

⁵⁰ *Will*, 491 U.S. at 71 n.10 (“Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the state.’” (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985))); *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th Cir. 2007).

⁵¹ *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013).

1 subject to a possible qualified immunity defense.⁵² For these personal-capacity claims,
2 Eleventh Amendment immunity issues are not implicated because the claim actually
3 is against the individual and not the state.⁵³
4

5 Under these principles, Plaintiff's § 1983 claim may be brought against
6 Governor Dunleavy in his official capacity for prospective injunctive and declaratory
7 relief and against the individual defendants in their personal capacities for damages.
8

9 **1. First Amendment in the public employment context**

10 Plaintiff's § 1983 claim against Defendants falls within the ambit of case
11 law governing First Amendment rights in relation to public employment. "The Court
12 has rejected for decades now the proposition that a public employee has no right to a
13 government job and so cannot complain that termination violates First Amendment
14 rights"⁵⁴ Under the Supreme Court's "unconstitutional conditions" doctrine, "the
15 government 'may not deny a benefit to a person on a basis that infringes his
16 constitutionally protected . . . freedom of speech' even if he has no entitlement to that
17 benefit."⁵⁵ Based on this doctrine, "[i]t is by now black letter law that 'a state cannot
18 condition public employment on a basis that infringes the employee's constitutionally
19 protected interest in freedom of expression.'"⁵⁶ This means that "[a]bsent some
20
21
22
23
24

25 ⁵² *Suever v. Connell*, 579 F.3d 1047, 1060–61 (9th Cir. 2009); *Kentucky v. Graham*, 473 U.S.
26 159, 166 (1985).

27 ⁵³ *Suever*, 579 F.3d at 1060.

28 ⁵⁴ *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996).

⁵⁵ *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

⁵⁶ *Nichols v. Dancer*, 657 F.3d 929, 932 (9th Cir. 2011) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

1 reasonably appropriate requirement, government may not make public employment
2 subject to the express condition of political beliefs or prescribed expression.”⁵⁷
3

4 Stemming from these principals are two types of cases—those falling
5 under the *Elrod/Branti*⁵⁸ line of patronage cases and those under the *Pickering*⁵⁹ free
6 speech retaliation cases. Under *Elrod/Branti*, as a general rule, public employees who
7 do not occupy a policymaking position cannot be terminated based upon their political
8 beliefs and associations.⁶⁰ Such patronage practices impermissibly infringe upon
9 public employees’ First Amendment associational rights. “The threat of dismissal for
10 failure to provide [support for the favored political party] unquestionably inhibits
11 protected belief and association, and dismissal for failure to provide support only
12 penalizes its exercise.”⁶¹ Party membership of the employee is not, in and of itself, the
13 determinative factor in these cases. That is, neither active campaigning or affiliation
14 with a competing party nor vocal opposition to the favored political party by the
15 employee is required to raise the issue of unconstitutional patronage. “[T]he right not
16 to have allegiance to the official or party in power itself is protected under the First
17 Amendment.”⁶² Consequently, to support a First Amendment claim under these
18 patronage cases, it is sufficient for the employee to show “that they were fired for
19
20
21
22
23
24
25

26 ⁵⁷ *O’Hare*, 518 U.S. at 717.

27 ⁵⁸ *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

28 ⁵⁹ *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563 (1968).

⁶⁰ *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994 (9th Cir. 1999).

⁶¹ *Elrod*, 427 U.S. at 359 (plurality opinion).

⁶² *Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 272 (3d Cir. 2007).

1 failing to endorse or pledge allegiance to a particular political ideology.”⁶³ In cases
2 involving patronage practices, no consideration of the government’s interest is
3 required, because such practices “unquestionably inhibit protected belief and
4 association” and “are not narrowly tailored to serve vital government interests” when
5 applied to employees in non-policymaking positions.⁶⁴

7
8 *Pickering* retaliation cases involve situations where a government
9 employer takes an adverse employment action against an employee in response to that
10 employee’s speech, rather than just political affiliation. Under these cases, it is
11 acknowledged that the government cannot unduly abridge employees’ free speech
12 rights, but it nonetheless has broader power to restrict the speech of its employees than
13 the speech of its constituents given the management interests at play.⁶⁵ As a result,
14 unlike the *Elrod/Branti* cases “where the raw test of political affiliation suffice[s] to
15 show a constitutional violation,” these speech-related cases require the application of
16 a balancing test developed in *Pickering* to determine whether the employee’s speech
17 is constitutionally protected.⁶⁶ Under the balancing test, the court must consider “the
18 interests of the [employee], as a citizen, in commenting upon matters of public concern,
19 and the interest of the State, as an employer, in promoting the efficiency of the public
20 services it performs through its employees.”⁶⁷ This balancing test is also applied in
21
22
23
24
25

26 ⁶³ *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) (quoting *Bass v. Richards*, 308 F.3d
27 1081, 1091 (10th Cir. 2002)).

28 ⁶⁴ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69, 74 (1990).

⁶⁵ *Pickering*, 391 U.S. at 568.

⁶⁶ *O’Hare*, 518 U.S. at 719.

⁶⁷ *Pickering*, 391 U.S. at 568.

1 “hybrid speech/association” claims, where speech is inextricably linked with
2 associational activity.⁶⁸

3
4 Under both types of cases—whether involving political affiliation or
5 political speech—an exception is carved out for those employees holding
6 policymaking or confidential positions; such employees may be fired for “purely
7 political reasons.”⁶⁹ In the Ninth Circuit, “an employee’s status as a policymaking or
8 confidential employee [is] dispositive of *any* First Amendment retaliation claim.”⁷⁰
9 This policymaker exception reflects the view that dissenting political affiliations and
10 speech from a policymaker or confidential employee is disruptive enough to the
11 government’s interest in implementing policy to outweigh that employee’s First
12 Amendment rights.⁷¹ However, “the exception is ‘narrow’ and should be applied with
13 caution.”⁷² Whether an employee falls within this classification is not simply a matter
14 of labels and titles; rather, “the question is whether the hiring authority can demonstrate
15 that party affiliation is an appropriate requirement for the effective performance of the
16 public office involved.”⁷³ Party affiliation is interpreted broadly to encompass
17
18
19
20
21
22
23

24 ⁶⁸ *Hudson v. Craven*, 403 F.3d 691, 695–98 (9th Cir. 2005); *Candelaria v. City of Tolleson,*
25 *Ariz.*, 721 Fed. Appx. 588, 590 n.1 (9th Cir. 2017).

26 ⁶⁹ *Hobler v. Brueher*, 325 F.3d 1145, 1150 (9th Cir. 2003).

27 ⁷⁰ *Biggs*, 189 F.3d at 994–95 (emphasis added).

28 ⁷¹ *See Hobler*, 325 F.3d at 1150 (noting that “some positions must be subject to patronage
dismissals for the sake of effective governance and implementation of policy”).

⁷² *Hunt v. Cty. of Orange*, 672 F.3d 606, 611 (9th Cir. 2012) (quoting *DiRuzza v. Cty. of*
Tehama, 206 F.3d 1304, 1308 (9th Cir. 2000)).

⁷³ *Branti*, 445 U.S. at 518.

1 political affiliation more generally, which “includes commonality of political purpose
2 and support.”⁷⁴

3 4 **2. Policymaker exception**

5 As a threshold matter, Defendants argue that they cannot be liable to
6 Plaintiff for any First Amendment violation because, as a level V assistant attorney
7 general within the Department of Law’s Labor and Affairs Section, Plaintiff occupied
8 a confidential/policymaker role within state government and therefore could be fired
9 for political reasons. Defendants bear the burden of establishing Plaintiff occupied
10 such a position.⁷⁵ That is, they must show that political considerations were relevant
11 to her job responsibilities. The nature and extent of Plaintiff’s duties are not disputed,
12 and therefore whether her job was a policymaking one is a question of law amenable
13 to summary judgment.⁷⁶

14
15
16
17 Defendants argue that almost all court decisions involving attorneys in
18 government service, other than public defenders, who raise First Amendment
19 retaliation claims against their government employers have held that these attorneys
20 function as policymakers. The Ninth Circuit acknowledged as much in *Biggs v. Best*,
21 *Best & Krieger*,⁷⁷ where it held that an associate in a private law firm, which had been
22 contracted to perform the services of a city attorney, held a confidential policymaking
23 position with the city and therefore could be terminated for political reasons. As the
24
25

26
27 ⁷⁴ *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (2001) (quoting *Biggs*, 189 F.3d at 996).

28 ⁷⁵ *DiRuzza v. Cnty. of Tehama*, 206 F.3d 1304, 1311 (9th Cir. 2000).

⁷⁶ *Walker*, 272 F.3d at 1132.

⁷⁷ 189 F.3d 989 (9th Cir. 1999).

1 court stated, “[a]ll circuit court decisions—and almost all other court decisions—
2 involving attorneys in government service, other than public defenders, have held that
3 *Elrod/Branti* do not protect these positions.”⁷⁸ Despite the many courts that have
4 assigned policymaker status to government attorney positions, the Ninth Circuit has
5 not endorsed a categorical approach to the analysis. “[T]here is no per se rule in this
6 circuit based solely on job title. The critical inquiry is the job actually performed.”⁷⁹
7
8

9 The Ninth Circuit has set forth nine factors that can be relevant when
10 determining the nature of a position for purposes of applying the policymaking
11 exception. These factors are as follows: (1) vague or broad responsibilities;
12 (2) relative pay; (3) technical competence; (4) power to control others; (5) authority to
13 speak in the name of policymakers; (6) public perception; (7) influence on programs;
14 (8) contact with elected officials; and (9) responsiveness to partisan politics and
15 political leaders.⁸⁰ These factors do not need to be applied mechanically but rather
16 should act as a guide to the underlying purpose and intent of the exception.⁸¹
17
18

19 Defendants argue that these factors lean in their favor. They rely on the
20 fact that Plaintiff, as a high-level attorney working with and for the Division of
21 Elections and other agencies, had responsibilities that affected state policy. Plaintiff
22 had wide-ranging job responsibilities. These included not only litigating elections-
23 related cases, but also providing agency advice, testifying on legislation, drafting
24
25

26 ⁷⁸ *Id.* at 997 (quoting *Fazio v. City & Cty. of San Francisco*, 125 F.3d 1328, 1333 (9th Cir.
27 1997)).

28 ⁷⁹ *DiRuzza*, 206 F.3d at 1310.

⁸⁰ *Fazio v. City & Cty. of San Francisco*, 125 F.3d 1328, 1334 n.5 (9th Cir. 1997).

⁸¹ *Hunt*, 672 F.3d at 611–12.

1 legislation and ballot summaries, and assisting with federal compliance.⁸²
2 Performance of these responsibilities necessarily involved contact with and being
3 responsive to the Lieutenant Governor.⁸³ She also worked for numerous other state
4 agencies, including the Office of the Governor, on litigation matters, regulations,
5 federal compliance, and legal advice.⁸⁴ She spoke on behalf of the Attorney General
6 in some instances, authoring opinions from the attorney general that provided guidance
7 to the Lieutenant Governor and the Director of the Division of Elections on election
8 issues.⁸⁵ She reasonably could have been perceived by the public as speaking for the
9 Attorney General because she worked on “highly politically-charged” elections issues
10 that had “significant media interest” and provided comments to the media about these
11 cases.⁸⁶

12 While these factors favor a finding that Plaintiff occupied a
13 confidential/policymaking role, they fail to adequately resolve the fundamental
14 question of whether favorable political affiliation is a valid qualification for her
15 position. As noted by the Supreme Court, the underlying purpose of the particular
16 position is relevant to the inquiry.⁸⁷ If requiring allegiance to the favored political
17 party “would undermine, rather than promote, the effective performance of [the
18 employee’s position]” then that position is not a policymaking one.⁸⁸ Here, Plaintiff’s
19
20
21
22
23
24

25 ⁸² [Docket 75-3 at ¶¶ 3–7](#); [Docket 75-33](#); [Docket 75-7](#); [Docket 56-1](#); [Docket 87-1 at 25–26](#).

26 ⁸³ *See, e.g.*, [Docket 87-2 at 1](#).

27 ⁸⁴ [Docket 75-33](#).

28 ⁸⁵ *See* [Docket 56 at 12–13 nn.57–58](#).

⁸⁶ [Docket 87-2 at 1](#); [Docket 56-2](#); [Docket 56-3](#).

⁸⁷ *Walker*, 272 F.3d at 1132 (citing *Branti*, 445 U.S. at 519).

⁸⁸ *Branti*, 445 U.S. at 519.

1 primary job responsibility was to handle election matters on behalf of the Lieutenant
2 Governor and the Division of Elections. Alaska law explicitly designates the Division
3 of Elections as a “nonpartisan” institution.⁸⁹ By statute it is “essential that the
4 nonpartisan nature, integrity, credibility, and impartiality of the administration of
5 elections be maintained.”⁹⁰ Given this essential mission of impartiality, favorable
6 partisan affiliation cannot be a valid qualification for an assistant attorney general
7 serving as designated counsel for the Division of Elections. While Plaintiff holds a
8 high-level job that involves elements of influence, trust, and visibility as identified by
9 application of the factors listed above, it is primarily exercised within the politically
10 impartial landscape of election law. Stated differently, “whatever policymaking occurs
11 in [that] office” does not relate to “partisan political interests.”⁹¹ As noted by Plaintiff
12 in her briefing, “accepting Defendants’ argument that political loyalty was an
13 appropriate requirement of Plaintiff’s work advising the division of elections would
14 only erode the nonpartisan nature of that institution.”⁹²

15
16
17
18
19
20
21
22
23
24
25
26
27
28

Given the court’s conclusion that Plaintiff was not exempted from First Amendment protections in the workplace context under the policymaker exception, the court must consider whether she was in fact terminated for politically based reasons and, if so, whether that was improper given the circumstances.

⁸⁹ Alaska Stat. § 15.10.105(b).

⁹⁰ *Id.*

⁹¹ *Branti*, 445 U.S. at 519.

⁹² Docket 75 at 31.

3. Plaintiff's termination

This court recently addressed the constitutionality of terminations stemming from Defendants' resignation plan in *Blanford v. Dunleavy*.⁹³ In that case, Defendants fired the plaintiffs after they refused to submit their resignations. It was undisputed that the plaintiffs' refusal to submit resignations was the reason for their terminations. The court concluded that Defendants' resignation plan effectively was a patronage scheme in that it required employees to provide an ostensible commitment of support for the newly elected governor in return for continued employment, and their decision to fire the plaintiffs for refusing to comply violated the plaintiffs' associational rights under the First Amendment. The court concluded that their terminations also violated the plaintiffs' free speech rights under a *Pickering* analysis: the plaintiffs' publicized refusal to comply with Defendants' resignation plan was expressive conduct, and Defendants' decision to fire them because of that expressive conduct without an outweighing government interest was a violation of the plaintiffs' First Amendment free speech rights.

The facts are critically different here. While Plaintiff's termination occurred in conjunction with the resignation plan, unlike the plaintiffs in the *Blandford* case, Plaintiff complied with the resignation requirement. Consequently, the reason for her termination is not as clear cut as in the prior case, and its constitutionality is not predetermined by the court's ruling. Instead, the court must consider the record to

⁹³ [Case No. 3:19-cv-00036-JWS, 2021 WL 4722948 \(D. Alaska Nov. 8, 2021\)](#).

1 determine whether there is sufficient evidence to demonstrate that Plaintiff was fired
2 for exercising her associational rights—such as not being associated with the favored
3 political party or failing to endorse a particular political ideology—or for exercising
4 her right to speak as a citizen on matters of public concern.
5

6 Babcock made the decision to fire Plaintiff. He claims that he fired
7 Plaintiff because her resignation letter was unprofessional in its tone.⁹⁴ Specifically,
8 he pointed to the portion of her letter that articulated the premise of the resignation
9 plan: “My resignation is not voluntary, but is instead being made at the request of
10 Mr. Babcock, who has indicated that if I do not submit my resignation as requested my
11 employment will be terminated.”⁹⁵ He testified that this statement felt like “a poke in
12 the eye” and “very grumbling” as if she was only doing it because he told her too.⁹⁶
13 He believed that “going out of your way to object to the request for resignation is
14 unprofessional.”⁹⁷
15
16
17

18 Babcock also testified that he was “generally aware” of her strong
19 opinions and of the fact that she maintained a blog where she commented about “her
20 political opponents.”⁹⁸ He insisted that he did not consult with Stroup as to which
21 attorneys’ resignations should be accepted and was not aware of Stroup’s opinion of
22 Plaintiff at that time, but he was aware of “doubts among various people that she could
23
24
25
26

27 ⁹⁴ [Docket 87-4 at 35–36.](#)

⁹⁵ [Docket 75-33](#); [Docket 87-4 at 35.](#)

⁹⁶ [Docket 87-4 at 35.](#)

⁹⁷ *Id.*

⁹⁸ *Id.* at 36.

1 . . . separate her professionalism from her strong opinions.”⁹⁹ Plaintiff’s letter
2 confirmed these doubts to him because it “demonstrated her unwillingness . . . to treat
3 this new administration professionally.”¹⁰⁰
4

5 He admitted that he did not have any formal process or criteria for
6 reviewing the hundreds of resignation letters and determining which ones to accept.
7 He explained if a letter did not raise any concerns about professionalism or attitude,
8 then it was up to “anyone on the transition team or the incoming commissioners to
9 raise any questions or issues.”¹⁰¹ Despite Babcock’s insistence that the content of each
10 resignation letter provided the basis for his employment decisions, he did not accept
11 the resignation of an assistant attorney general who had used the same wording that he
12 had found objectionable when used by Plaintiff.¹⁰² Indeed, the only other attorney
13 within the Department of Law whose resignation was accepted was Ruth Botstein, a
14 well-regarded and experienced attorney who worked on high-profile cases.¹⁰³ There
15 is no evidence to explain what her resignation letter stated that made Babcock or others
16 in Governor Dunleavy’s transition team question her ability to work cooperatively or
17 professionally. The evidence does show, however, that, like Plaintiff, Botstein had
18 been publicly critical of President Trump for a period of time and was the subject of
19
20
21
22
23
24
25

26 ⁹⁹ *Id.* at 32, 36–37.

27 ¹⁰⁰ *Id.* at 36.

28 ¹⁰¹ *Id.* at 32–34.

¹⁰² Docket 75-39.

¹⁰³ Docket 75-3 at ¶¶ 22–25; Docket 75-2 at ¶ 26.

1 Stroup’s social media postings about liberal attorneys within the Department of
2 Law.¹⁰⁴

3
4 Given this evidence, it is clear that Babcock’s decision to terminate
5 Plaintiff was motivated by reasons connected to her First Amendment rights. Although
6 there was not a direct refusal on Plaintiff’s part to comply with the resignation request
7 as in *Blanford*, Babcock himself stated that he viewed her letter as voicing an objection
8 to the request that was unacceptably defiant to the administration. That is, it failed to
9 convey to him an adequate show of support or commitment to work for the Dunleavy
10 Administration. As he explained, “it demonstrated her unwillingness to me to treat
11 this new administration professionally.”¹⁰⁵ Defendants argue that Babcock simply did
12 not like the attitude she showed in the letter and that his dislike was devoid of political
13 context. Taking Babcock’s testimony that he was not “very familiar” with Plaintiff’s
14 political beliefs as true, he was nonetheless aware that she held strong opinions that
15 might cause her to clash with the administration and that she wrote a blog where she
16 criticized her political opponents.¹⁰⁶ Moreover, the letter itself cannot reasonably be
17 deemed unprofessional for stating the factual premise of the resignation plan: she did
18 not want to resign her job but had to in order to keep it. Therefore, Babcock’s
19 perceived defiance certainly was informed by his general knowledge of her opposing
20 political views and blog, and, when taken together with evidence as to how other
21
22
23
24
25
26

27 ¹⁰⁴ [Docket 75-23](#); [Docket 75-41](#).

28 ¹⁰⁵ [Docket 87-4 at 36](#).

¹⁰⁶ *Id.*

1 attorneys were treated, there is no reasonable dispute about the fact that some
2 combination of Plaintiff's political beliefs and speech factored into Defendants'
3 decision to terminate her employment. In such situations, the court must apply a
4 *Pickering* analysis.

5
6 The Ninth Circuit has synthesized *Pickering* and its progeny into a five-
7 factor evaluation:
8

9 (1) whether the plaintiff spoke on a matter of public
10 concern; (2) whether the plaintiff spoke as a private citizen
11 or public employee; (3) whether the plaintiff's protected
12 speech was a substantial or motivating factor in the
13 adverse employment action; (4) whether the state had an
14 adequate justification for treating the employee differently
even absent the protected speech.¹⁰⁷

15 The plaintiff bears the burden at the first three steps of the inquiry. The fourth step of
16 the analysis represents the *Pickering* balancing test, and it is at this step where the
17 burden shifts to the government employer to show that there were legitimate
18 administrative interests involved that outweigh the employee's right to comment as a
19 private citizen about matters of public concern.
20
21

22 There is no dispute that Plaintiff acted as a private citizen when voicing
23 her political opinions and that those opinions related to matters of public concern, and
24 the court has concluded that these opinions were the motivating factor in her
25 termination. The issue is whether Defendants had a countervailing management
26
27
28

¹⁰⁷ *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).

1 interest at stake. They must show Plaintiff’s public opinions affected the government’s
2 interest in providing services efficiently.¹⁰⁸ This burden is met with evidence of actual
3 workplace disruption or evidence supporting a reasonable prediction of workplace
4 disruption resulting from the speech.¹⁰⁹ Workplace disruption occurs when the
5 employee’s speech “impairs discipline by supervisors or harmony among co-workers,
6 has a detrimental impact on close working relationships . . . or impedes the
7 performance of the [employee’s] duties or interferes with the regular operation of the
8 enterprise” or is reasonably likely to do so.¹¹⁰

11 Disruption is not limited to internal workplace relationships and
12 performance. Negative public perception stemming from an employee’s speech or
13 conduct can constitute workplace disruption when the employee holds a position where
14 public trust and integrity are paramount to the government employer’s mission. For
15 example, in *Locurto v. Giuliani*,¹¹¹ the Second Circuit applied such reasoning to hold
16 that the government lawfully fired police officers who participated in a parade with
17 racist lampooning that was covered by local media. It stated that a police department’s
18 effectiveness “depends importantly on the respect and trust of the community and on
19 the perception in the community that it enforces the law fairly, even-handedly, and
20 without bias.”¹¹² The Ninth Circuit similarly has reasoned that a government employer

26 ¹⁰⁸ *Pickering*, 391 U.S. at 568.

27 ¹⁰⁹ *Nichols*, 657 F.3d at 933–34.

28 ¹¹⁰ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Nichols*, 657 F.3d at 933.

¹¹¹ 447 F.3d 159 (2d Cir. 2006).

¹¹² *Id.* at 178.

1 can reasonably assume workplace disruption stemming from speech that when known
2 to the public would harm the credibility of the employer's operations.¹¹³

3
4 Defendants argue that Plaintiff's position as counsel to the Division of
5 Elections made her public blogging activities particularly disruptive. The Division of
6 Elections is non-partisan in its mission. As the director of the civil division for the
7 Department of Law, Joanne Grace, stated in her deposition, "it's a foundational
8 principle of the Division of Elections that the administration of elections be
9 nonpartisan, have credibility, integrity, and be impartial" ¹¹⁴ She noted that public
10 perception is "the foundation of public trust in elections, and that public trust is
11 essential to people accepting the results of an election." ¹¹⁵ Public trust in the
12 Division's impartiality is central to its mission and operations.
13
14

15 Plaintiff's role as the division's attorney was not insignificant to this
16 mission. As discussed above, her job required her to represent the division in litigation;
17 provide the division legal advice; testify on relevant legislation; assist with federal
18 compliance; and help draft legislation and regulations in the area of elections law. She
19 had a hand in determining legal issues around which ballots to count, how initiatives
20 and referendums should appear on ballots, and which summaries should go into the
21 election pamphlets. ¹¹⁶ She authored many publicly available attorney general opinions
22 providing guidance to the Lieutenant Governor on various initiatives and referenda
23
24
25
26

27 ¹¹³ *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008).

28 ¹¹⁴ Docket 87-1 at 11.

¹¹⁵ *Id.* at 12.

¹¹⁶ *Id.* at 25–26.

1 applications. She authored attorney general opinions providing guidance to the
2 Director of the Division of Elections about applications seeking the recall of elected
3 officials. Indeed, her work admittedly sometimes involved “highly politically-
4 charged” elections issues that had “significant media interest.”¹¹⁷ Given these duties,
5 the public’s perception of her impartiality is a legitimate government concern. As
6 Grace articulated in her deposition, “the more outspoken the elections attorney is, the
7 more partisan and . . . the more public she becomes about partisan issues, the more that
8 undermines her ability to stand up in court and argue that an action of the Division of
9 Elections, which she probably advised them to take, was impartial and fair.”¹¹⁸ That
10 is to say, frequent and widespread partisan commentary by an elections attorney is
11 reasonably likely to undermine the public’s trust in the integrity and credibility of
12 elections.
13

14
15
16
17 Given Plaintiff’s position and the public nature of her political
18 commentary, it would not have been unreasonable for state officials to consider her
19 speech a disruption to the Division of Election’s operations, warranting adverse
20 employment action. Indeed, this was a growing concern to her supervisors within
21 Department of Law.¹¹⁹ However, as the Supreme Court has noted, “[v]igilance is
22 necessary to ensure that public employers do not use authority over employees to
23 silence discourse not because it hampers public functions but simply because superiors
24
25
26

27 ¹¹⁷ [Docket 87-2 at 1.](#)

28 ¹¹⁸ [Docket 87-1 at 11–12.](#)

¹¹⁹ [Id. at 18–23.](#)

1 disagree with the content of the employees' speech."¹²⁰ Consequently, even though
2 Plaintiff's blogging could reasonably be predicted to interfere with operations, the
3 government must show that it in fact acted in response to that likely interference and
4 not because of a disagreement with the content.¹²¹

6 This is where Defendants fall short. Defendant Babcock did not mention
7 any concerns he had about her blogging or public opinions affecting the integrity and
8 credibility of the Division of Elections or even state government generally. There is
9 no evidence that he or members of the transition team were aware of any concerns
10 raised by her supervisors within the Department of Law, legislators, or other Division
11 of Elections employees. Indeed, he maintained he did not seek advice from anyone
12 outside of Governor Dunleavy and his immediate staff,¹²² and he did not mention that
13 these people raised concerns about how her conduct was affecting the non-partisan
14 mission of the Division of Elections or the public's perception of the State's attorneys.

18 The only concern related to workplace disruption articulated by Babcock
19 during his deposition was with regard to Plaintiff's professionalism. The
20 professionalism he was concerned about was personal in nature, limited to her ability
21 to be respectful to a new administration with opposing political viewpoints. He
22 thought her comment that her resignation was not voluntary was "a poke in the eye" to
23 him and confirmation that she was unwilling "to treat the new administration
24

27 ¹²⁰ *Rankin*, 483 U.S. at 384.

28 ¹²¹ *See Locurto*, 447 F.3d at 175–76.

¹²² *Docket 87-4* at 32.

1 professionally.”¹²³ This concern that disruption would occur because Plaintiff would
2 not be professional in the performance of her job is unsupported by evidence. The
3 letter itself is not objectively defiant; it simply states the convoluted premise of
4 Defendants’ resignation plan—employees were forced to resign their jobs to show they
5 actually wanted to keep their jobs.¹²⁴ There is no evidence that Plaintiff’s work product
6 had ever been biased or that she failed to thoroughly represent the State of Alaska’s
7 interests as defined by any of the previous five administrations or as directed by
8 supervisors. Indeed, she never publicly criticized any position taken by the State of
9 Alaska related to her work. There is no evidence that she acted unprofessionally at
10 work under previous administrations. While Defendants now rely on the
11 unprofessional content of Plaintiff’s blog, which contained irreverent and vulgar
12 language, that concern was not mention by Babcock during his deposition. Indeed, he
13 specifically refrained from suggesting he knew anything specific or particular about
14 her blog or its contents. Rather, he maintained that he just generally was aware she
15 had strong opinions and a blog.
16
17
18
19
20

21 With a more measured approach to staffing decisions, Defendants
22 reasonably could have predicted that Plaintiff’s political blogging activities would
23 negatively affect the mission of the Division of Elections and relied on this reason to
24 take adverse employment action against Plaintiff. As noted above, concern about this
25 type of disruption stemming from Plaintiff’s increasingly political blog was a known
26
27

28 ¹²³ *Id.* at 35–36.

¹²⁴ *See, e.g., Docket 87-1 at 24.*

1 issue within the Department of Law. However, Defendants, who made the decision to
2 fire Plaintiff without consultation, failed to show that they had any awareness of this
3 particular concern, or that they acted in response to it rather than a dislike of her
4 personal views.
5

6 Without an adequate showing that Defendants actually were motivated
7 by a reasonable concern for the potentially disruptive effects of Plaintiff's publicly
8 espoused political opinions, the court must conclude that her termination ran afoul of
9 the First Amendment.
10

11 **4. Qualified Immunity**

12 Defendants argue that regardless of any underlying constitutional
13 violation, they are entitled to qualified immunity that shields them from personal
14 liability.¹²⁵ "The doctrine of qualified immunity shields officials from civil liability so
15 long as their conduct does not violate clearly established . . . constitutional rights of
16 which a reasonable person would have known."¹²⁶ Given the court has found a First
17 Amendment violation, the remaining issue to be determined is whether Plaintiff's right
18 to be free from a politically-motivated termination was clearly established. A right is
19 clearly established when it has a "sufficiently clear foundation in then-existing
20 precedent."¹²⁷ The rule must be "dictated by controlling authority or a robust
21
22
23
24
25

26 ¹²⁵ Qualified immunity is only an immunity from suit for damages, not immunity from suit
27 for declaratory or injunctive relief. *L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th
28 Cir. 1993).

¹²⁶ *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotations omitted).

¹²⁷ *Nunes v. Arata, Swingle, Van Egmond & Goodwin (PLC)*, 983 F.3d 1108, 1112 (9th Cir.
2020) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)).

1 consensus of cases of persuasive authority.”¹²⁸ “There does not need to be a ‘case
2 directly on point,’ but existing precedent must place the statutory or constitutional
3 question ‘beyond debate.’”¹²⁹ The right cannot be defined with a “high level of
4 generality.”¹³⁰ This is particularly so when the circumstances involve quick judgments
5 made by officials in uncertain and rapidly evolving circumstances, or when an outcome
6 is otherwise highly fact dependent.¹³¹

9 It is clearly established that Defendants could not lawfully fire non-
10 policymaking employees based on adverse political affiliation and speech. As such,
11 Defendants’ qualified immunity defense turns on whether they reasonably could have,
12 but mistakenly, believed that it was legally appropriate to make political loyalty a
13 requirement of Plaintiff’s job. As noted above, in the vast majority of cases addressing
14 the issue, government attorneys have been found to be policymakers.¹³² This is true
15 not only of prosecutors and city attorneys, but state assistant attorney generals as
16 well.¹³³ The Ninth Circuit has acknowledged this body of case law.¹³⁴ These cases
17 rely on the fact that government attorneys, even if supervised, often exercise significant
18 authority on behalf of the ultimate policymaker through litigation, drafting advisory
19
20
21

23 ¹²⁸ *Id.* (quoting *Wesby*, 138 S. Ct. at 589–90).

24 ¹²⁹ *Id.* (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)).

25 ¹³⁰ *Id.*

26 ¹³¹ *Id.* at 1112–13; *Gilbrook v. City of Westminster*, 177 F.3d 839, 867 (9th Cir. 1999).

27 ¹³² “[C]ircuits that have addressed the *Elrod-Branti* exception in the context of government
28 attorney dismissals, whether for assistant district attorneys or other government attorneys, have held
these attorneys occupy positions requiring political loyalty and are not protected from political
dismissals under the First Amendment.” *Aucoin v. Haney*, 306 F.3d 268, 275 (5th Cir. 2002) (listing
examples).

¹³³ See *Latham v. Office of Attorney Gen. of Ohio*, 395 F.3d 261, 269 (6th Cir. 2005).

¹³⁴ *Biggs*, 189 F.3d at 995.

1 opinions and legislation, advising agencies, and preparing contracts, and therefore they
2 play a role in shaping and implementing policy.¹³⁵ In *Biggs*, the Ninth Circuit held
3 that a city attorney operated as a policymaker in city government, because, even though
4 the attorney was a subordinate, she presented reports to the city's governing council
5 on legal issues, worked on high-profile issues, drafted regulations and ordinances, and
6 spoke to the press on occasion.¹³⁶ These responsibilities, notably similar to Plaintiff's,
7 were enough for the court to find that she occupied a position where political alignment
8 was a valid job qualification. Based on *Biggs*, it was reasonable for Defendants to
9 think that a high-level assistant attorney undertaking the responsibilities she outlined
10 in her resignation letter could be fired for political reasons. While this court ultimately
11 concluded that Plaintiff's position was distinguishable given her role as counsel to the
12 Division of Elections, no existing precedent or body of persuasive case law would have
13 made this conclusion readily apparent. That is, there is no existing precedent that
14 placed this issue beyond debate.

15
16 Plaintiff stresses that Alaska law provides a clear and definitive answer
17 as to who in state government constitutes a policymaker, barring any qualified
18 immunity defense here. Indeed, Alaska's State Personnel Act establishes a system of
19 personnel administration based upon the merit principle.¹³⁷ As such, selection and
20 retention of employees must be "secure from political influences."¹³⁸ However, while
21
22
23
24
25
26

27 ¹³⁵ See *Latham*, 395 F.3d at 268–69.

28 ¹³⁶ *Biggs*, 189 F.3d at 995–96.

¹³⁷ Alaska Stat. § 39.25.010.

¹³⁸ *Id.*

1 provisions and rules adopted pursuant to the Personnel Act apply as a matter of course
2 to all classified employees, they only apply to the exempt and partially exempt service
3 as “specifically provided.”¹³⁹ The position of assistant attorney general falls under the
4 partially exempt category.¹⁴⁰ Partially exempt employees are exempt from some, but
5 not all, of the rules governing job classification and payment, recruiting, appointment,
6 and examining.¹⁴¹ Similarly, not all political protections afforded under the Personnel
7 Act apply to partially exempt employees. The Act provides that an employment
8 decision affecting a *classified* employee cannot be taken or withheld on the basis of
9 unlawful discrimination due to political beliefs, but it does not extend this protection
10 to partially exempt employees.¹⁴² While the Act protects the right of a “state
11 employee” to engage in political activity and express political opinions,¹⁴³ this
12 protection is not unlimited.¹⁴⁴ As the Alaska Supreme Court noted “the merit principle
13 was not intended to impede the efficient management of state affairs.”¹⁴⁵ The court
14 cannot conclude that the legislature, through the Personnel Act, intended to confirm
15 that partially exempt employees, as a matter of course, are not policymakers as that
16 term is understood in First Amendment analysis. Even if the Act does in fact confer
17
18
19
20
21
22
23

24 ¹³⁹ [Alaska Stat. § 39.25.090.](#)

25 ¹⁴⁰ [Alaska Stat. § 39.25.120\(c\)\(3\).](#)

26 ¹⁴¹ [Alaska Stat. § 39.25.120\(a\)–\(b\); Alaska Stat. § 39.25.150.](#)

27 ¹⁴² [Alaska Stat. § 39.25.160\(g\).](#)

28 ¹⁴³ [Alaska Stat. § 39.25.178.](#)

¹⁴⁴ *See, e.g., Alaska Stat. § 39.25.178(3)* (prohibiting the display of partisan political materials “while engaged on official business”); [Alaska Stat. § 39.52.170\(a\)](#) (barring outside employment or volunteer services that are “incompatible or in conflict with the proper discharge of [the employee’s] official duties”); [9 Alaska Admin. Code 52.090.](#)

¹⁴⁵ [Moore v. State](#), 875 P.2d 765, 769 (Alaska 1994).

1 full political protection to partially exempt employees, there is no precedent or “robust
2 consensus of cases” holding that a state statute establishing a merit system of
3 employment provides a definitive test for who is and who is not a policymaking
4 employee for purposes of a First Amendment analysis.

5
6 The court concludes that the law governing the policymaking status of a
7 government attorney with Plaintiff’s job responsibilities was not so clearly established
8 that Defendants should be denied qualified immunity.
9

10 **B. Plaintiff’s State Law Claims**

11 Plaintiff seeks relief against Defendants under state law as well.¹⁴⁶ She
12 asserts that her termination was unconstitutional under state law, relying on both
13 Article 1, § 5, which protects citizens’ right to free speech, and Article XII, § 6, which
14 establishes Alaska’s merit system of public employment. She also raises a good faith
15 and fair dealing claim.
16
17

18 Generally speaking, Alaska’s public employee free speech cases rely
19 heavily on federal law.¹⁴⁷ Consequently, given the First Amendment violation present
20 in the circumstances here, Plaintiff’s termination also was unconstitutional under state
21 law, but Alaska does not recognize a constitutional claim for damages unless the case
22
23

24 ¹⁴⁶ The court has jurisdiction over such claims against the State because Defendants removed
25 the case from state court to federal court, waiving any immunity defense. *Lapides v. Bd. of Regents of*
26 *Univ. Sys. of Ga.*, 535 U.S. 613, 620–24 (2002) (holding that the state, which had statutorily waived
27 its immunity from state-law claims in state court, also waived its Eleventh Amendment immunity from
28 suit in federal court on state-law claims for money damages when it voluntarily removed case to federal
court); *Embury v. King*, 361 F.3d 562, 566 (9th Cir. 2004) (“Removal waives Eleventh Amendment
immunity.”).

¹⁴⁷ See *Wickwire v. State*, 725 P.2d 695, 700 (Alaska 1986); *State v. Haley*, 687 P.2d 305, 312
(Alaska 1984).

1 involves flagrant violations where no alternative remedies are otherwise available.¹⁴⁸
2 Plaintiff's § 1983 claim constitutes such an alternative remedy, even if it ultimately is
3 barred by defenses.¹⁴⁹
4

5 Despite this limitation, Plaintiff still is afforded relief for an
6 unconstitutional termination under state law through her good faith and fair dealing
7 claim. Pursuant to Alaska Stat. § 09.50.250, a person with a contract, quasi-contract,
8 or tort claim against the state may raise such a claim in state court. Implicit in an
9 employee's contract of employment with the State is a promise that the employee will
10 not be terminated for an unconstitutional reason.¹⁵⁰ "[W]hen the State fires an
11 employee for an unconstitutional reason, [it] amounts to unfair dealing as a matter of
12 law and gives rise to contract remedies."¹⁵¹ Here, Plaintiff was fired in violation of her
13 free speech rights, which necessarily amounts to unfair dealing under state law.
14
15

16 Plaintiff also asserts her termination ran afoul of Article XII, § 6, which
17 establishes a merit system of public employment. However, the court concludes that
18 the constitutionally protected merit principle and the statute implementing it does not
19 provide Plaintiff with an independent cause of action against the State. The
20 constitution itself merely requires the legislature to "establish a system under which
21 the merit principle will govern the employment of persons by the State."¹⁵² The
22
23
24

25 ¹⁴⁸ *Larson v. State*, 284 P.3d 1, 9–10 (Alaska 2012).

26 ¹⁴⁹ *State v. Heisey*, 271 P.3d 1082, 1096-97 (Alaska 2012). While Plaintiff cannot seek
27 damages for the state constitutional violation, she may proceed to the extent she seeks declaratory or
injunctive relief under this claim. *Larson*, 284 P.3d at 9–10.

28 ¹⁵⁰ *State v. Haley*, 687 P.2d 305, 318 (Alaska 1984).

¹⁵¹ *Id.*

¹⁵² Alaska Const. art. XII, § 6.

1 Personnel Act defines and implements this principle. It generally provides that
2 selection and retention of employees must be “secure from political influences.”¹⁵³ It
3 sets forth requirements for job classification and payment, recruiting, appointment, and
4 examining, as well as prohibitions against certain employment practices, to guarantee
5 this merit system, but it does not explicitly confer an independent private cause of
6 action.¹⁵⁴ Nor does it supplant and provide greater protection than First Amendment
7 law with respect to the political speech and association of state employees. “As
8 defined, the merit principle requires the recruitment, selection, and advancement of
9 public employees under conditions of political neutrality In actual practice,
10 however, the merit principle is more complex and ambiguous than the above definition
11 reveals.”¹⁵⁵ For example, Alaska Stat. § 39.25.160(g) protects employees in the
12 *classified* service from “unlawful discrimination due to political beliefs.”¹⁵⁶ Partially
13 exempt employees are not afforded protection under this provision. Moreover, what
14 constitutes “unlawful” political discrimination is necessarily defined by constitutional
15 law. While Alaska Stat. § 39.25.178 declares that “a state employee” has the right to
16 express political opinions, there is nothing to suggest that this right is unlimited or
17
18
19
20
21
22
23

24 ¹⁵³ Alaska Stat. § 39.25.010(b)(5).

25 ¹⁵⁴ Cf. *Walt v. State*, 751 P.2d 1345, 1351 (Alaska 1988) (“[N]o sufficient justification has
26 been advanced which persuades us that a tort cause of action grounded on AS 39.25.160(f) should be
27 recognized.”); *Peterson v. State*, 236 P.3d 355, 368 n.44 (Alaska 2010) (“[T]he analysis of [the
28 plaintiff’s] merit selection claim is subsumed within our discussion of [his] other claims concerning
the hiring process, including his claims of discrimination and his claims concerning the implied
covenant of good faith and fair dealing.”).

¹⁵⁵ *Alaska Pub. Employees Ass’n v. State*, 831 P.2d 1245, 1249 (Alaska 1992) (citations
omitted).

¹⁵⁶ Alaska Stat. § 39.25.160(g).

1 otherwise greater than what might be protected pursuant to *Pickering*. Indeed, “the
2 merit principle was not intended to impede the efficient management of state
3 affairs.”¹⁵⁷ As noted by Defendants, “[t]his is why Alaska cases follow *Pickering*
4 rather than simply citing the merit principle in every instance involving the speech of
5 an employee covered by the Act.”¹⁵⁸
6

7 8 V. CONCLUSION

9 Based on the preceding discussion, Plaintiff’s motion at docket 76 is
10 GRANTED IN PART AND DENIED IN PART and Defendants’ motion at docket 56
11 is GRANTED IN PART AND DENIED IN PART as follows:
12

13 1. Plaintiff’s termination violated her free speech and
14 associational rights under the federal and state constitutions. Plaintiff is entitled
15 to relief under § 1983 and state law but only to the extent she seeks prospective
16 declaratory and injunctive relief. Qualified immunity shields Defendant
17 Governor Dunleavy and Defendant Babcock from personal liability for this
18 violation.
19

20 2. Plaintiff’s unconstitutional termination amounts to unfair
21 dealing under state law.
22

23 3. Plaintiff has no claim to relief under Alaska’s merit
24 principle.
25
26
27

28 ¹⁵⁷ *Moore*, 875 P.2d at 769.

¹⁵⁸ *Docket 86 at 30* (citing *Wickwire*, 725 P.2d at 700).

The parties are instructed to promptly confer and then within 14 days from this order's date to file a notice that identifies the remaining issues for litigation. The notice should also suggest a schedule for resolving the outstanding issues.

IT IS SO ORDERED this 20th day of January, 2022, at Anchorage,
Alaska.

/s/ John W. Sedwick
JOHN W. SEDWICK
Senior United States District Judge